

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON
REFERRAL FROM THE DEPARTMENT OF COMMERCE, COMMUNITY AND
ECONOMIC DEVELOPMENT**

IN THE MATTER OF)	
)	
Colin & Maria Towse)	Case No. OAH 07-0063-TOB
dba Point MacKenzie General Store)	Agency Case No. 0501-06-241
_____)	

DECISION

I. Introduction

The Department of Commerce, Community and Economic Development, Division of Corporations, Business and Professional Licensing (“the division”), notified Colin and Maria Towse, doing business as Point MacKenzie General Store, that it was suspending their entitlement to hold a business license tobacco endorsement for 45 days and imposing a civil fine of \$5,000.00. The Towses requested a hearing. The Commissioner of Commerce, Community and Economic Development referred the case to the Office of Administrative Hearings to establish the facts and recommend a decision. Administrative Law Judge Dale Whitney heard the case on July 26, 2007. Mr. Towse appeared by telephone. Assistant Attorney General Cynthia Drinkwater represented the division.

Under the circumstances of this case, Mr. and Ms. Towse should be required to pay a \$500 civil penalty for selling tobacco without a valid tobacco endorsement.

II. Facts

Most of the facts in this case are not in dispute. Colin and Maria Towse owned the Point Mackenzie General Store until they sold it on December 18, 2006. The division’s records show that the Towses obtained a business license for the store on July 24, 2000, and paid the extra \$25 for a two-year tobacco endorsement. There are no records for the intervening time until the license was renewed for one year on December 29, 2005, without a tobacco endorsement, which would have cost an extra \$100 for the one-year period.

On December 13, 2006, an investigator from the Department of Revenue inspected the store for compliance with cigarette tax stamp laws and noticed that the store’s business license lacked a tobacco endorsement. The investigator from the Department of Revenue notified an investigator from the Department of Commerce Community and Economic Development (DCCED). DCCED then sent the Towses a notice that they were being fined \$5,000 and that their right to obtain a tobacco endorsement was being suspended for 45 days. No effort was made to contact the Towses

and inquire whether they were aware that they were out of compliance with the tobacco endorsement requirement.

Mr. Towse testified that he was unable to explain his store's lack of a tobacco endorsement. He stated that he did not specifically remember renewing the business license, and could not say why he did not pay for a tobacco endorsement at the same time. He did state that he and his wife had worked very hard to build up the business. Tobacco sales were an important part of the business, and the Towses had always intended to keep all of their licenses and permits in proper order. Mr. Towse testified that he could see no incentive to not get an endorsement, as he considered the \$100 fee to be trivial in light of the importance of tobacco sales to the business. Although he could not explain why he did not obtain a tobacco endorsement, Mr. Towse was credible in his testimony that he had no intent to deceive any person or governmental authority, or to evade any legal responsibility. The most probable explanation is that Mr. Towse's failure to obtain a tobacco endorsement was the result of a clerical error or good-faith mistake in completing the license renewal paperwork.¹

III. Discussion

This case is governed by the following provisions of AS 43.70.075:

(a) Unless a person has a business license endorsement issued under this section for each location or outlet in a location where the person offers tobacco products for sale, a person may not sell or allow a vending machine to sell in its location or outlet cigarettes, cigars, tobacco, or other products containing tobacco as a retailer at that location or outlet. Each endorsement required under this section is in addition to any other license or endorsement required by law. A person may not apply for an endorsement under this section for a location or outlet if an endorsement issued for the same location or outlet is currently suspended or revoked. An endorsement issued for a location or outlet to a person in violation of this subsection is void.

* * * * *

(k) If a person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, violates a provision of (a) or (g) of this section, the department may suspend the person's business license endorsement or right to obtain a business license endorsement for a period of not more than (1) 45 days....

* * * * *

(s) If a person violates (a) of this section, the department may impose a civil penalty not to exceed \$250 for each day of the violation. The total civil penalty imposed under this

¹ The original business license and tobacco endorsement was obtained in the name of Ms. Towse only. Mr. Towse testified that Ms. Towse speaks English as a second language and does not always understand more complex or legal language. Mr. Towse offered this fact as an explanation of why Ms. Towse was not also appearing at the hearing, not as a reason for not renewing the tobacco endorsement.

subsection for each violation may not exceed \$5,000. The civil penalty described in this subsection may be imposed in addition to a suspension of a business license endorsement or the right to obtain a business license endorsement ordered by the department under (k) or (o) of this section.

Mr. Towse does not dispute the division's claim that from January 1, 2006, through December 18, 2006, he and Ms. Towse sold tobacco at the MacKenzie General Store without a valid tobacco endorsement to the store's business license. The sole issue in this case is the amount and duration of the penalty, if any, to be assessed.

In its closing argument, the division asked that the maximum allowable fine of five thousand dollars be imposed. According to the division,

The point here is that selling tobacco is a highly regulated industry. As investigator Faulkenbury testified, there are federal laws and state laws. And it's just not the kind of thing where business owners can just take a hands-off approach and just assume that everything's okay unless they are told otherwise. While he may not have intended to violate the law, he did so, and Point Mackenzie General Store did not have a tobacco endorsement for at least almost all of calendar year 2006 up until the time they sold the store. Mr. Towse testified that tobacco sales were a regular part of their business, that they promoted it, and consequently while this might not be a situation where there was an intention to violate the law, the law was violated and the division's position is that it's not at all a trivial matter, but instead it's a very serious matter. In this case a suspension under the provision of the statute that allows for a suspension of the tobacco endorsement would not be applicable since the business has been sold. So really the fine is what we're looking at in terms of imposing a meaningful penalty here. And under the circumstances where there isn't a suspension that can be meaningfully applied, the division would ask for the full five thousand dollars to be imposed.

To some degree, the division mischaracterizes Mr. Towse's statements. Mr. Towse said that if the division had simply notified him that he did not have a tobacco endorsement, he would have immediately rectified the problem. Mr. Towse did not suggest that it is acceptable for all business owners to neglect obtaining endorsements, and then sit by and wait for the division to catch them. His point was that he is not a scofflaw and would have immediately remedied his error of omission if it had been pointed out to him; he did not feel that it was necessary for the division to automatically fine business owners \$5,000 when a simple letter or phone call would have immediately solved an honest mistake.

The division also emphasizes Mr. Towse's choice of the word "trivial" in his testimony: "First of all I'd like to apologize for taking up all of your valuable time; it's such a trivial sort of thing." But Mr. Towse followed this comment with, "the cost of a tobacco endorsement is less than a day's salary for one of my part-time employees." On cross-examination Mr. Towse clarified that what he meant was trivial was the \$100 fee for an endorsement, not selling tobacco without an

endorsement. Review of the record does suggest that, in context, Mr. Towse was apologizing that his omission of only \$100 was consuming such great administrative resources.

The division's view that a demonstrated disregard for the law merits a greater penalty in this case is incorrect. Mr. Towse admitted an error he could not explain; while he regarded the imposition of a \$5,000 penalty to be excessive or even "ridiculous" under the circumstances, his attitude was far from flippant.

Mr. Towse's assertion that his failure to obtain the endorsement was merely a clerical error is credible. The Towses did have a tobacco endorsement in the past, and a one-time mistake in renewing their business license does not provide a basis for imposing the maximum possible penalty. The period in which the Towses sold tobacco without an endorsement was lengthy, but only because they were not aware that they had failed to renew the endorsement. It does not appear that the omission actually hindered any agency's ability to inspect the business, as it was an on-site inspection by the Department of Revenue that brought the lack of an endorsement to light. There is no evidence to contradict Mr. Towse's statement that he has always run his business "above board" and readily held it open for inspection by any authority.

The Towses should have paid \$100 for an endorsement at the beginning of 2006. Payment of five times that much now would be an adequate penalty to alert the Towses and other business owners to the seriousness and importance of maintaining a tobacco endorsement if a business is selling tobacco products. The division is correct that imposing a suspension of the right to sell tobacco would serve no purpose, the Towses having since sold their store.

IV. Conclusion

A civil penalty of \$500 should be imposed in this case. No period of suspension of a tobacco endorsement would be appropriate in this case.


V. Order

Upon adoption of this Decision as a final administrative decision in this matter, Colin and Maria Towse shall pay a civil penalty in the amount of \$500.00.

DATED this 12 day of December, 2007.

By: 

DALE WHITNEY
Administrative Law Judge



Adoption

This Order is issued under the authority of AS 44.33.010 and AS 44.17.010. The undersigned, on behalf of the Commissioner of Commerce, Community and Economic Development and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

DATED this 8th day of January, 2007.

By: _____
Signature Emil Notti
Name Commissioner
Title _____

The undersigned certifies that this date an exact copy of the foregoing was provided to the following individuals:

Colin & Maria Tause
Cynthia Drinkwater, NAG
Signature _____ Date 1/16/08